No. 17-773

In the Supreme Court of the United States

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL,
DEPUTY COMMISSIONER FOR OPERATIONS,
SOCIAL SECURITY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether 42 U.S.C. 406(b)(1)(A) establishes that 25% of a claimant's past-due benefits under Title II of the Social Security Act is the maximum aggregate amount of attorney's fees that may be charged for representing the claimant in both administrative and court proceedings under Title II.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 861 F.3d 1197. The order of the district court (Pet. App. 18a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 23, 2017, and the petition was filed on November 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The positions of Commissioner of Social Security and Deputy Commissioner of Social Security are vacant. Ms. Berryhill is performing the delegable duties and functions of the Commissioner of Social Security.

STATEMENT

1. The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain individuals eligible for such benefits under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability [OASDI] benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental security income (SSI) benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75. A claimant may seek administrative review of SSA's initial determination, including any denial of (past-due and ongoing) benefits to which she may be entitled, 42 U.S.C. 405(b), 1383(c)(1) and (2), and may then seek judicial review of the resulting final agency decision, 42 U.S.C. 405(g), 1383(c)(3).

Title II of the Social Security Act separately regulates the amount of attorney's fees that may be collected from an OASDI claimant for representing the claimant in agency proceedings, 42 U.S.C. 406(a), and on judicial review, 42 U.S.C. 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002).[2] "Collecting or even demanding from the client anything more than the authorized [fee for such representation] is a criminal offense." *Id.* at 796; see 42 U.S.C. 406(a)(5) and (b)(2). The question presented in this case is whether Section 406(b)(1)(A)

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[2] Title XVI of the Act incorporates most of the attorney's fee provisions for agency and court proceedings in Section 406(a) and (b) with modifications for SSI cases, 42 U.S.C. 1383(d)(2)(A), and separately addresses payment of such fees from past-due SSI benefits, 42 U.S.C. 1383(d)(2)(B). Title XVI fees are not at issue in this case.

establishes that 25% of the claimant's past-due benefits is the maximum aggregate amount of attorney's fees that may be charged for representing a claimant in both administrative and court proceedings under Title II.

a. *Fees for Administrative Proceedings.* Under Title II, an attorney may seek fees "[f]or representation of a benefits claimant at the administrative level" by either filing "a fee petition" with SSA under Section 406(a)(1) or seeking SSA's approval of a "fee agreement" with the claimant under Section 406(a)(2). *Gisbrecht*, 535 U.S. at 794.

i. *Fee petitions.* Section 406(a)(1) provides that "[t]he Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any [Title II] claim before the Commissioner." 42 U.S.C. 406(a)(1). Section 406(a)(1) further provides that, except as provided by provisions in Section 406(a)(2) governing fee agreements, "whenever the Commissioner of Social Security * * * makes a determination favorable to the claimant" on "any claim before the Commissioner for benefits under [Title II]" in which the claimant was represented by an attorney, "the Commissioner shall * * * fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim." *Ibid.*

SSA's implementing regulations require that the claimant's representative submit a "written request" for "approval of a fee for services * * * performed in dealings with [the agency]," which the representative should file with the agency "after the proceedings * * * are completed." 20 C.F.R. 404.1725(a). That fee petition must include, *inter alia*, a list of the services provided, the amount of time spent on each type of service, and the amount of the fee that the representative seeks to charge

for those services. 20 C.F.R. 404.1725(a)(2)-(3). In fixing the amount of a reasonable fee, the agency will "consider the amount of benefits, if any, that are payable," but the agency will ultimately "base the amount of fee [it] authorize[s]" on multiple factors and "may authorize a fee even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

ii. *Fee agreements.* In 1990, Congress enacted Section 406(a)(2), which established an alternate "streamlined process for a representative to obtain approval of [a] fee" for "representing a claimant before the agency" based on a written fee agreement. 74 Fed. Reg. 6080 (Feb. 4, 2009). A representative may invoke that process under Title II by "present[ing] in writing" to the agency "an agreement between the claimant" and the representative "prior to the time of the Commissioner's determination." 42 U.S.C. 406(a)(2)(A). If the Commissioner's determination is "favorable to the claimant" on a "claim of entitlement to past-due benefits" and "the fee specified in the agreement" does not exceed the lesser of "25 percent of the total amount of such past-due benefits" or a prescribed dollar amount (currently, $6000), see 42 U.S.C. 406(a)(2)(A)(ii) and (iii), the Commissioner "shall approve" the agreement "at the time of the favorable determination" and "the fee specified in the agreement shall be the maximum fee." 42 U.S.C. 406(a)(2)(A). Cf. 42 U.S.C. 406(a)(3)(A) (addressing administrative review of a fee approved based on a fee agreement).[3]

In a case involving a fee "agreement described in [Section 406(a)(2)](A)" that relates to both a claim for past-due

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[3] Congress has authorized the Commissioner to "increase the dollar amount under [Section 406(a)(2)(A)](ii)(II)" to reflect "the rate of increase in primary insurance amounts" after January 1, 1991. 42 U.S.C. 406(a)(2)(A). In 2009, the Commissioner increased the prescribed amount to $6000. 74 Fed. Reg. at 6080.

OASDI benefits (under Title II) and a claim for past-due SSI benefits (under Title XVI), Section 406(a)(2) imposes an additional requirement when the Commissioner makes "a favorable determination * * * with respect to both such claims." 42 U.S.C. 406(a)(2)(C). The Commissioner "may approve" such an agreement "only if the total fee or fees specified in [the] agreement" for representing the claimant before the agency on his Title II and Title XVI claims "does not exceed, in the aggregate, the [$6000] amount" noted above. *Ibid.*; see 42 U.S.C. 406(a)(2)(A)(ii)(II); p. 4 n.3, *supra*.

iii. *Direct payments to attorneys.* If SSA has approved a maximum attorney's fee under either the fee-petition or fee-agreement process and the claimant is "entitled to past-due benefits under [Title II]," the attorney may obtain payment for some or all of the approved fee directly from the government out of the claimant's past-due benefits. 42 U.S.C. 406(a)(4). In such cases, the Commissioner "shall * * * certify for payment" to the attorney "out of [the] past-due benefits * * * an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits" (minus an assessment charged to the attorney for the direct payment). *Ibid.*; see 20 C.F.R. 404.1730(b)(1) and (d); cf. 42 U.S.C. 406(d) (assessment). SSA's Program Operations Manual System (POMS) states that "[i]f the authorized fee exceeds the amount of withheld Title II benefits" that SSA may pay directly to the representative, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Nov. 2006), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920017 (emphasis omitted).

b. *Fees for Court Proceedings.*

i. If a claimant seeks judicial review of a final agency decision under Title II, Section 406(b) governs the attorney's fees that may be charged to the claimant. 42 U.S.C. 406(b). Section 406(b) provides in pertinent part:

> Whenever a court renders a judgment favorable to a claimant under [Title II] who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. 406(b)(1)(A). "[N]o other fee may be payable * * * for such representation except as provided in [Section 406(b)(1)]." *Ibid.*

The Commissioner then "may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits" (minus an assessment for the direct payment). 42 U.S.C. 406(b)(1)(A); see 20 C.F.R. 404.1728(b); cf. 42 U.S.C. 406(d) (assessment). The POMS states that although "[t]he court fee is in addition to the fee, if any, SSA authorizes for proceedings at the administrative level," SSA will only "withhold[] a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both." POMS, GN 03920.017D.5, Note 1; accord POMS, GN 03920.035A (Feb. 2005), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920035.

ii. A provision of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), separately authorizes a court reviewing SSA's final decision to order the recovery of "reasonable attorney fees" from the United States in certain circumstances in which such fees were "incurred by [the prevailing claimant] in [his] civil action" and the

government's position was not "substantially justified." 28 U.S.C. 2412(d)(1)(A) and (2)(A). If the court awards fees under both Section 406(b) and Section 2412(d), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee,'" which can "effectively increase[] the portion of past-due benefits the successful Social Security claimant may pocket." *Gisbrecht*, 535 U.S. at 796 (citation omitted; first set of brackets in original).[4]

2. a. Claimant Katrina Wood applied for OASDI disability benefits under Title II of the Social Security Act, which SSA initially denied. See Pet. App. 3a; Supp. C.A. App. 12, 76. Petitioner is an attorney who represented Wood before SSA and, later, in district court. See Pet. App. 3a, 5a.[5]

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[4] An amendment to EAJA addresses Section 406(b)(1)'s prohibition against charging a Title II claimant any fee for representing the claimant in court "except as provided in [Section 406(b)(1)]," 42 U.S.C. 406(b)(1). That amendment provides that Section 406(b)(1) "shall not prevent an award of fees and other expenses under [EAJA] [S]ection 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (reproduced as the "Savings Provision" at 28 U.S.C. 2412 note). The amendment also provides that the criminal prohibitions in Section 406(b)(2) "shall not apply with respect to any such award" if, "where the claimant's attorney receives fees for the same work under both [Section 406(b) and Section 2412(d)], the claimant's attorney refunds to the claimant the amount of the smaller fee." *Ibid.*

[5] Petitioner initially sought this Court's review on the question presented in the context of two separate Social Security cases in which he represented claimants Wood and Bill Westfall. Pet. II, 5, 31. Cf. Pet. App. 30a-35a, 36a-57a (fee decisions in Westfall's case). By letter to this Court dated March 30, 2018, petitioner limited his certiorari petition to his attorney's fee request in Wood's case and expressly waived any claim to additional attorney's fees in Westfall's case. This brief therefore addresses the question presented as it arises only in Wood's case.

After SSA denied Wood's disability claim, Wood executed a contingency-fee agreement with petitioner for petitioner's work in her upcoming district court action. Supp. C.A. App. 11. That agreement states that Wood "agrees to pay a fee of 25 percent of the total of the past-due benefits to which [she was] entitled" as payment for "[petitioner's] representation of [her] in Federal Court" if she ultimately succeeds in obtaining such benefits. *Ibid.* The agreement further states that the fees specified therein do "not cover or include [payment for] any representation before the [SSA]." *Ibid.*

Petitioner subsequently represented Wood in district court, where the parties consented to adjudication by a magistrate judge. See Pet. App. 3a, 4a n.2. The magistrate judge reversed the agency decision and remanded for further proceedings. *Id.* at 4a.

b. On remand, SSA awarded Wood a total of $34,383 in past-due disability benefits: $30,871 for herself and $3512 for her child as an auxiliary beneficiary. Pet. App. 4a; see D. Ct. Doc. 27, at 2 (Mar. 29, 2016) (explaining that $3512, not $4340, is the correct amount of auxiliary benefits). The agency withheld a total of 25% of Wood's past-due benefits ($8595.75) from its immediate payment of benefits to cover any direct payment of attorney's fees that might ultimately be warranted. Supp. C.A. App. 14, 18; see Pet. App. 4a. The agency later granted petitioner's fee petition in part, authorizing him to charge Wood $2865 for representing her before the agency under Section 406(a). See Supp. C.A. App. 21; Pet. App. 5a.

c. Meanwhile, in district court, the magistrate judge ordered the government to pay $4107.27 in attorney's fees under EAJA. Pet. App. 4a. Petitioner subsequently moved for a separate award of $4488.48 in attorney's fees under Section 406(b) for representing Wood in court. *Id.*

at 5a. Petitioner calculated the amount of that fee request ($4488.48) by subtracting the EAJA award ($4107.27) from the attorney's fee specified in petitioner's fee agreement for the district court case (25% of Wood's past-due benefits, *i.e.*, $8595.75). Supp. C.A. App. 5.

The magistrate judge awarded $1623.48 in Section 406(b) attorney's fees but otherwise denied petitioner's fee request. Pet. App. 18a-29a. The judge concluded that "the total fee under Sections 406(a) and (b) cannot exceed 25% of the [claimant's] past-due benefits." *Id.* at 21a. The judge also concluded that if a court grants an attorney's fee award under EAJA, the claimant's attorney must refund to the claimant the amount of the EAJA fee or the Section 406(b) fee, whichever is smaller. *Ibid.* In this case, the judge continued, petitioner subtracted the $4107.27 EAJA award from the maximum $8595.75 amount reflecting "25% of [Wood's] past due benefits" but had "erroneously fail[ed] to deduct" the $2865 Section 406(a) fee that SSA had previously approved for petitioner's work before the agency. *Id.* at 22a. The judge thus subtracted the Section 406(a) fee from petitioner's request and awarded him a $1623.48 fee under Section 406(b). *Id.* at 26a, 29a. That amount, the judge noted, was "far less than" amounts approved in other Section 406(b) contexts involving contingent-fee agreements. *Id.* at 28a.

3. Petitioner perfected appeals from the attorney's-fee decisions in four Social Security benefits cases in which he represented the claimants, including Wood. Cf. Pet. App. 1a-2a.[6] The court of appeals consolidated the appeals and affirmed. *Id.* at 1a-17a.

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[6] Although the claimants were named as appellants in each of those appeals, Pet. App. 1a-2a, petitioner was the real party in interest in the appeals because, as their attorney, he sought "to obtain higher fee awards under [Section] 406(b)." *Gisbrecht*, 535 U.S. at

The court of appeals explained that *Dawson* v. *Finch*, 425 F.2d 1192 (5th Cir.), cert. denied, 400 U.S. 830 (1970), was "binding precedent" in the Eleventh Circuit and that *Dawson* held that "the 25% limit from [Section] 406(b) applies to total fees awarded under both [Section] 406(a) and (b)." Pet. App. 11a-12a & n.4. Under *Dawson*, the court determined, Section 406(b) "'preclud[es] the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" *Id.* at 12a (quoting *Dawson*, 425 F.2d at 1195).

The court of appeals stated that, in each of the cases before it, the magistrate judge had "relied on *Dawson*," which remained binding on the court of appeals under the "prior panel precedent rule." Pet. App. 12a, 14a. Although the court acknowledged that petitioner had identified decisions from other courts of appeals that "do not apply the 25% limit in [Section] 406(b) to the aggregate fee award under [Section] 406," the court noted that those extra-circuit decisions "either explicitly or implicitly recognize that *Dawson* limited the combined [Section] 406(a) and (b) attorney's fee awards to 25% of past-due benefits" and did "not empower [the panel here] to ignore [*Dawson*'s]" precedential effect. *Id.* at 13a-14a.

DISCUSSION

Petitioner contends (Pet. 15-25) that Section 406(b) —which caps certain attorney's fees at 25% of the claimant's past-due benefits—applies only to the amount of fees for an attorney's representation of the claimant in court proceedings, not on the aggregate amount of fees for representing the claimant in both agency and court

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798 n.6; see Pet. App. 3a n.1. The certiorari petition accordingly names petitioner (and not claimant Wood) as the petitioner before this Court. See Pet. II; cf. p. 7 n.5, *supra*.

proceedings. Petitioner further contends (Pet. 6-15) that the courts of appeals have divided on that question. The government concludes that petitioner is correct on both points, that this Court's review is warranted to resolve the division of authority, and that this case is a suitable vehicle for the Court's review. If the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

1. The court of appeals held that "the 25% limit from [Section] 406(b) applies to total fees awarded under both [Section] 406(a) and (b)" and, for that reason, Section 406(b) prohibits "'the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" Pet. App. 11a-12a (citation omitted). That is incorrect. The text of Section 406(b) unambiguously applies its 25% cap only to the amount of attorney's fees for a claimant's "represent[ation] before the court." 42 U.S.C. 406(b)(1)(A). Section 406(b) thus does not restrict fees that may be awarded under Section 406(a) for representing the claimant before the agency or limit the aggregate amount of fees for such representation before the agency and in court. That conclusion is confirmed by the broader statutory context, which demonstrates that attorney's fees for agency proceedings under Section 406(a) can alone exceed 25% of the claimant's past-due benefits so long as such fees are reasonable.

a. i. Section 406(b) applies its 25% cap on attorney's fees only with respect to fees awarded for representing the claimant in court. The relevant portion of Section 406(b) provides:

> Whenever a court renders a judgment favorable to a claimant under [Title II] who was *represented before*

> *the court* by an attorney, the court may determine and allow as part of its judgment a *reasonable fee for such representation, not in excess of 25 percent* of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. 406(b)(1)(A) (emphasis added). The 25% cap in that passage limits the amount of a "reasonable fee for such representation." "[S]uch representation," in turn, refers directly back to the circumstances of a claimant who was "represented before the court." See *ibid.* Nothing in Section 406(b) addresses attorney's fees for representing a claimant in agency proceedings.

No other plausible construction exists. The adjective "such" is "used to avoid repetition," and it means "of the sort or degree previously indicated." *Webster's Third New International Dictionary* 2283 (1981). The phrase "such representation" in Section 406(b) thus necessarily refers to the provision's only antecedent reference to representation, namely, the claimant's "represent[ation] before the court" by an attorney. 42 U.S.C. 406(b)(1)(A).

If Congress had intended to apply the limitations in Section 406(b) to fees for representation before SSA, it would have done so expressly. Elsewhere in Section 406, Congress made it quite clear when it intended to address fees for work before the agency. See, *e.g.*, 42 U.S.C. 406(a)(1) (discussing "any claim before the Commissioner" and requiring a "reasonable fee to compensate [an] attorney for the services performed by him in connection with such claim"); *ibid.* (addressing "the maximum fees which may be charged for services performed in connection with any claim before the Commissioner"). Where, as here, "Congress includes particular language in one section of a statute but omits it

in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Moreover, when Congress intended to impose a cap on the aggregate amount of total fees under Section 406, it enacted clear text to set such a limit. Section 406(a) specifically addresses fee agreements for work performed before the agency for a claimant with an OSADI claim under Title II and a separate SSI claim under Title XVI. 42 U.S.C. 406(a)(2)(C). If the claimant prevails on both such claims, Congress directed that the agency approve the fee agreement only if "the *total fee or fees* specified in such agreement does not exceed, in the *aggregate*," $6000. *Ibid.* (emphasis added); see p. 4 n.3, *supra*. Had Congress intended to impose a 25% cap on the "aggregate" amount of fees awarded under Section 406(a) and (b), it would have enacted analogous text.

ii. An aggregate 25% past-due-benefit cap would also be inconsistent with other provisions within Section 406(a).

Congress has required that SSA determine the amount of a "reasonable fee" under Section 406(a)(1)'s fee petition process without imposing any fixed limit on the amount of that fee. 42 U.S.C. 406(a)(1). The only statutory criterion for fixing such a fee is that the fee must be "reasonable." *Ibid.* As a result, so long as a fee for an attorney's work before the agency is "reasonable" under Section 406(a), that fee can exceed 25% of the claimant's past-due benefits.

Section 406(a)'s text governing SSA's payment of an attorney's agency-approved maximum fee directly out of the claimant's past-due benefits confirms that Section 406(a) fees for work before the agency can

exceed 25% of the claimant's past-due benefits. Section 406(a)(4) directs that the agency "shall * * * certify for payment out of such past-due benefits * * * *so much of* the maximum fee *as* does not exceed 25 percent of such past-due benefits. 42 U.S.C. 406(a)(4) (emphasis added). That provision thus reflects that the "reasonable fee" approved by the agency may sometimes exceed 25% of a claimant's past-due benefits, because the provision limits the extent to which the agency may pay an attorney out of those benefits, permitting the agency to pay only "so much of" the approved fee as does not exceed 25% of the past-due benefits. As SSA's publicly available guidance explains, when the "authorized fee exceeds the amount of withheld Title II benefits" for the payment of fees from those benefits, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Nov. 2006).

SSA's longstanding interpretation of Section 406 also reflects that the "reasonable fee" that may be sought by filing an agency fee petition under Section 406(a)(1) is not capped at 25% of past-due benefits. The agency's regulations make clear that the agency may authorize a reasonable fee "even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

Those provisions permitting a fee award under Section 406(a) that *exceeds* 25% of a claimant's past-due benefits confirm that Section 406(b)'s limitation capping fees at 25% of past-due benefits does not apply beyond such fees awarded under Section 406(b) for an attorney's work in court and does not limit the aggregate amount of fees under both Section 406(a) and (b). It would be anomalous to conclude that Congress permitted a "reasonable fee" exceeding 25% of a claimant's

past-due benefits under Section 406(a)(1) for work before the agency but, by virtue of Section 406(b), imposed a cap on the aggregate amount of fees for both the agency and court proceedings equal to *only* 25% of such benefits.

iii. The absence of a statutory cap on the aggregate amount of attorney's fees for agency proceedings (under Section 406(a)) and court proceedings (under Section 406(b)) does not mean that the agency and courts should approve fees that in aggregate total 50% or more of the client's past-due benefits. Although it is "mathematically possible" to produce an aggregate fee of such magnitude without a 25% aggregate cap, such a result should be "unlikely" if the agency and the courts properly discharge their responsibility to "ensur[e] the attorney fee is reasonable." *Wrenn ex rel. Wrenn* v. *Astrue*, 525 F.3d 931, 938 (10th Cir. 2008).

SSA requires that any fee petition seeking a "reasonable fee" for work performed in agency proceedings, 42 U.S.C. 406(a)(1), disclose the amount of any separate fee the representative "wants to request or charge * * * in the same matter before any * * * court." 20 C.F.R. 404.1725(a)(4). The agency then considers that additional fee amount when setting a reasonable agency fee in light of the Social Security program's "purpose" of "provid[ing] a measure of economic security for the beneficiaries." 20 C.F.R. 404.1725(b)(1) and (1)(vii). The agency's authority in the fee-agreement context is more circumscribed, but the maximum contractual fee that it may approve—25% of past-due benefits or $6000, whichever is smaller, 42 U.S.C. 406(a)(2)(A)(ii)—is itself subject to reduction on administrative review if, *inter alia*, that amount is "clearly excessive for [the] services rendered," 42 U.S.C. 406(a)(3)(A).

A court similarly may approve only a "reasonable fee" for an attorney's work before it, 42 U.S.C. 406(b), and may—like the agency—properly consider the total sum that an attorney seeks to charge the client for handling agency and court proceedings on the same claim when exercising its discretion to determine what fee is reasonable under Section 406(b). Even when lawful contingency-fee agreements are implicated, Section 406(b) requires both that attorneys "show that the fee sought is reasonable for the services rendered" and that courts review such fee arrangements "as an independent check, to assure that they yield reasonable results in particular cases" and to make "downward adjustment[s]" when warranted. *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 807-808 (2002). The proper exercise of that authority to enforce the reasonableness of fees under Section 406 should avoid excessive charges to Social Security claimants.

b. The court of appeals in this case concluded that it was bound by the Fifth Circuit's decision in *Dawson* v. *Finch*, 425 F.2d 1192, cert. denied, 400 U.S. 830 (1970). See Pet. App. 11a-12a & n.4, 14a. Neither *Dawson* nor the Fourth Circuit's similar decision in *Morris* v. *SSA*, 689 F.2d 495 (1982) (per curiam), provides a sound basis for disregarding Section 406(b)'s unambiguous text.

In *Dawson*, the Fifth Circuit affirmed a district court's decision to award an attorney no fees under Section 406(b) for successfully representing a claimant in court, because SSA had already approved an attorney's fee for administrative proceedings that equaled 25% of the claimant's past-due benefits, which the court understood to constitute the "total fee allowance" in this context. 425 F.2d at 1192. The court of appeals stated that it had considered "[t]he statutory language and legislative history of Section [4]06(b)," *id.* at 1195, and it block-quoted the relevant

statutory text, which applies when a court enters a judgment favorable to a claimant "'who was represented before the court by an attorney'" and which caps the amount of a reasonable fee "'for such representation'" at 25% of the past-due benefits, *id.* at 1193 (quoting 42 U.S.C. 406(b)). But *Dawson* did not set forth any textual analysis that might have arguably supported its holding. See *id.* at 1193-1195. *Dawson* merely noted that the attorney seeking fees had not "discussed the statutory language" in arguing for his contrary position. *Id.* at 1195.

Dawson relied heavily on congressional testimony preceding Section 406(b)'s enactment in 1965 in which an official of the Department of Health, Education, and Welfare (which was then responsible for administering the Social Security Act) noted an "occasion[al]" problem of "what appeared to be inordinately large fees for representing claimants *in Federal district court actions* arising under the social security program." 425 F.2d at 1194 (emphasis added; citation omitted). But that testimony does not reflect that Section 406(b) imposes a cap on the *aggregate* amount of fees for both administrative and court proceedings. The text of Section 406(b), like that testimony, targets only attorney's fees for representation in court proceedings.

The Fourth Circuit's per curiam decision in *Morris* likewise offered no sound basis for concluding that Section 406 "limits the aggregate attorney's fees recoverable to twenty-five percent of the claimant's past-due benefits." 689 F.2d at 496. *Morris* rested its decision on an inference it derived from Section 406(a) and (b). First, *Morris* determined that Section 406(b) imposes a 25% cap on the amount of attorney's fees that "courts [may] authorize[]." *Id.* at 497. Second, *Morris* determined that Section 406(a) also prohibits SSA from "approv[ing] an

attorney's fee in excess of twenty-five percent," apparently based on statutory text—now amended and relocated to Section 406(a)(4)—stating that the agency "'shall . . . certify for payment (out of [the claimant's] past-due benefits)'" up to "'25 per centum of the total amount of such past-due benefits.'" *Id.* at 497 & n.1 (quoting 42 U.S.C. 406(a) (1976)); see *id.* at 496. *Morris* then concluded that "the most reasonable inference to be drawn" from the purported 25% caps in both Section 406(a) and (b) was that Congress intended an aggregate 25% cap "to establish a ceiling for attorney's fees that was independent of the course of the proceedings." *Id.* at 497-498.

That inference-based analysis does not purport to ground an aggregate 25% fee cap in any statutory text directly establishing such a limit and, for the reasons previously discussed, that atextual reading is incorrect. Moreover, *Morris* is flawed even on its own terms. *Morris* erroneously conflated SSA's determination of a reasonable fee for agency proceedings under Section 406(a) with the agency's separate certification under Section 406(a) of a direct "payment" to the attorney for (some or all of) the approved fee, deeming the latter to impose a cap on the former. See *Clark* v. *Astrue*, 529 F.3d 1211, 1217-1218 (9th Cir. 2008) (criticizing this error). As such, the Fourth Circuit's inferential logic is flawed because it rests on a mistaken understanding of Section 406(a). See *ibid.*

2. a. Petitioner contends (Pet. 6-15) that *Dawson*, *Morris*, and the Eleventh Circuit's decision in this case reflect a longstanding and acknowledged division of authority in which the Sixth, Ninth, and Tenth Circuits have reached conflicting results. The government agrees. Since 1982, the courts of appeals that have interpreted the relevant provisions of Section 406 without relevant binding circuit precedent have concluded—contrary to

Dawson, *Morris*, and the decision below—that Section 406 does not impose any aggregate cap on attorney's fees for agency and court proceedings.

First, in *Horenstein* v. *Secretary of Health & Human Services*, 35 F.3d 261 (6th Cir. 1994) (en banc), the government successfully petitioned the en banc Sixth Circuit to overturn the court's earlier decision in *Webb* v. *Richardson*, 472 F.2d 529 (6th Cir. 1972), which had held that only one tribunal may award fees under Section 406 and that the resulting fee award for administrative and court proceedings was subject to a "blanket 25 percent cap." *Horenstein*, 35 F.3d at 262; see *id.* at 261. The government argued, *inter alia*, that "*Webb's* 25% cap conflicts with [S]ection 406(a)(1)," because "[S]ection 406(a)(1) contains no limitation on the amount of the reasonable fee" that SSA may approve for work before the agency and permits such a fee even if the claimant is not awarded any "past-due benefits." Gov't Br. and Suggestion of Initial Hr'g En Banc at 17-18, *Horenstein*, *supra* (Nos. 90-4028, 92-4302).

The en banc Sixth Circuit agreed with that position. *Horenstein*, 35 F.3d at 262-263. The court concluded that Section 406(a)(1) allows the agency to specify the "'reasonable fee' for work done before the [agency]," imposes "no requirement that such an award be made from past-due benefits," and is not restricted by Section 406(b)'s 25% limitation for "services performed in a federal court." *Id.* at 262. *Horenstein* further determined that in contexts in which "the court remands the case" to the agency, the court may award a fee up "to 25 percent of past-due benefits" "for the work performed before it" and, *in addition*, the agency may "award whatever fee [it] deems reasonable for the work performed on remand and prior administrative proceedings." *Ibid.* The court

accordingly overturned "*Webb*'s blanket 25 percent cap" and the associated "single tribunal rule" on the ground that both violated the terms of Section 406. *Id.* at 263.

In 2008, the Ninth and Tenth Circuits similarly held that Section 406 does not impose a cap on the aggregate amount of attorney's fees that may be approved for work in administrative and court proceedings. *Clark*, *supra* (9th Cir.); *Wrenn*, *supra* (10th Cir.). The Tenth Circuit reasoned that a 25% past-due-benefits cap on the "combined [amount of] attorney fees" was inconsistent with the "clear and unambiguous" text of Section 406(a) and (b), which grants the agency and a court "authority to independently determine the appropriate attorney fees" for the administrative and court proceedings, subject to distinct statutory requirements in Section 406(a) and (b). *Wrenn*, 525 F.3d at 932, 936-937.

The Ninth Circuit has "follow[ed] the Sixth and Tenth Circuits" by holding that "the plain text of [Section] 406(b) limits only the amount of attorney's fees awarded under [Section] 406(b)" for work done "in federal district court" —"not the combined fees" for work done before the agency and the court. *Clark*, 529 F.3d at 1213, 1215. The court reasoned that because "[t]he phrase 'such representation' [in Section 406(b)(1)] refers to representation 'before the court,'" Section 406(b)'s 25% cap limits "attorney's fees only for representation before the court, not before the [agency]." *Id.* at 1215 (quoting 42 U.S.C. 406(b)(1)). The court also reasoned that an aggregate 25% cap was inconsistent with Section 406(a)(1), because that provision authorizes SSA to approve fees for agency proceedings "in any amount—including amounts greater than 25% of past-due benefits—so long as the fees are 'reasonable.'" *Id.* at 1216.

b. *Horenstein*, *Wrenn*, and *Clark* cannot be reconciled with *Dawson*, *Morris*, and the decision of the court of appeals in this case. Certiorari is warranted to resolve that division of authority over whether Section 406 imposes a 25% past-due-benefits cap on the aggregate amount of attorney's fees that may be charged for representing a Social Security claimant before the agency and in court.

The question presented is significant and frequently recurring. In the fiscal year ending September 30, 2017 alone, over 10,000 new Social Security cases under Title II and nearly 9000 new SSI cases under Title XVI were filed in federal court. Admin. Office of the U.S. Courts, *Civil Judicial Business* Tbl. C-2A, at 4 (Sept. 30, 2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2017.pdf. Moreover, unlike other contexts in which questions of attorney compensation are normally resolved between attorneys and their clients, attorneys must seek compensation for their work on Social Security matters through Section 406 because they are prohibited by law from knowingly charging a fee for Title II (and Title XVI) cases exceeding that authorized under Section 406. See 42 U.S.C. 406(a)(5) and (b)(2), 1383(d)(2)(A); see also p. 2 n.2, *supra*. Although the financial stake in any one case is relatively low when compared to business litigation, the question whether fees governed by Section 406(a) and (b) are subject to an aggregate 25% cap must be regularly addressed in the Social Security context.

This Court has previously granted review to resolve a similar division of authority in the same context concerning "the appropriate method of calculating fees under [Section] 406(b)." *Gisbrecht*, 535 U.S. at 799. The Court should follow the same course here. The petition for a writ of certiorari—as limited by petitioner, see p. 7 n.5, *supra*—squarely and cleanly presents the

question presented, which warrants the Court's plenary review.

3. Finally, the government acknowledges that it has participated as a party in the conflicting appellate decisions and that it has been on both sides of the issue. After *Dawson* (1970) and *Morris* (1982) announced a 25% cap on the aggregate amount of fees under Section 406, the government sought—and successfully obtained—en banc review in *Horenstein* (1994) based on arguments logically inconsistent with the existence of a 25% cap on such aggregate attorney's fees. See *Horenstein*, 35 F.3d at 261-262; cf. 28 C.F.R. 0.20(b); see pp. 19-20, *supra*. By 2007, however, the government as the appellee in *Wrenn* and *Clark* defended an overall 25% cap. See *Wrenn*, 525 F.3d at 935-936; see also Gov't C.A. Br. at 16-23, *Clark*, *supra* (No. 07-35056) (available at 2007 WL 2414560). The government subsequently took the same position as appellee in this case, albeit based on *Dawson*'s binding precedential force in the Eleventh Circuit. Gov't C.A. Br. 26, 29 & n.8, 33-35.

The government has now reconsidered its position in light of the certiorari petition. The government concludes that the position that it advocated to the en banc court in *Horenstein* is correct and that, for the reasons above, Section 406 does not impose an overall cap on the aggregate amount of attorney's fees for agency and court proceedings under Title II of the Social Security Act. For that reason, if the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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